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Local 3, International Brotherhood of Electrical Workers, AFL–CIO *and* Slattery Skanska, Inc. and Local 731, Building Concrete & Common Laborers Union. Case 29–CD–568

June 28, 2004

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Local 731, Building Concrete & Common Laborers Union (Local 731 or the Laborers) filed charges on October 7, 2003, alleging that the Respondent, Local 3, International Brotherhood of Electrical Workers, AFL–CIO (Local 3 or the Electricians), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer, Slattery Skanska, Inc. (Slattery), to assign certain work to employees it represents rather than to employees represented by Local 731. The hearing was held from January 5 to 7, 2004, before Hearing Officer Richard Bock. Thereafter, Local 731 filed a brief in support of its position and Local 3 filed a motion to quash the notice of hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Slattery, a New York corporation, with its principal office and place of business in Whitestone, New York, is engaged in the performance and maintenance of construction projects including, but not limited to, railway, roadway, bridge, tunnel, environmental, and power generation. During the 12-month period preceding the hearing, a representative period, Slattery performed services valued in excess of $50,000 in States other than the State of New York. The parties stipulated, and we find, that Slattery is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 3 and Local 731 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Slattery is the general contractor on a New York Transit Authority project to build a new railcar maintenance facility at the Corona Rail Yard in Queens, New York. The project requires the installation of new precast concrete boxes or manholes and the relocation of electrical conduit through those manholes. Slattery subcontracted the electrical conduit work to Transit Technologies, LLC (f/k/a Petrocelli Electrical). Slattery's subcontract with Transit Technologies states: "All manholes furnished by Slattery Skanska, Inc." and "[s]ubcontractor to support installation." In its prebid exceptions, dated June 6, 2003,[1] Transit Technologies disclaimed responsibility for the "[o]ff-loading and setting of manholes" and stated that its employees would "provide support" to Slattery during the installation of manholes.

Beginning with the installation of the first two manholes on August 13, Slattery employees (represented by Local 731) and Transit Technologies employees (represented by Local 3) disputed who would set the manholes into the ground. Slattery intended to assign this work to its employees with Transit Technologies employees standing by to assist if needed. Despite this intention, as Slattery General Superintendent Mike Attardo testified, Transit Technologies employees physically took over the installation from Slattery's employees as a manhole was unloaded from a truck by "grabbing" tag lines from Slattery's foreman. In an effort to curtail the disruption caused by the Transit Technologies employees, Slattery installed these first two manholes utilizing both groups of employees. After this installation, Local 731, by its Business Manager Joe D'Amato, told Slattery that the setting of precast concrete manholes belonged to the employees represented by Local 731.

In early September, Slattery began installing the next two manholes, but Slattery Project Superintendent Pete Mesbah stopped the installation because an argument over who was going to install the manholes was "getting ugly." According to Mesbah, approximately 20 unauthorized Transit Technologies employees were on the jobsite and there was an argument between the groups about which employees were going to set the manholes. Mesbah testified that the "chaotic" atmosphere "just wasn't right" and that he believed someone might have gotten hurt. Slattery simply unloaded these manholes without setting them in the ground and arranged a meeting with Local 731, Local 3, and Transit Technologies representatives to discuss the dispute.

At the September 30 meeting, Local 3, by its Business Representative Joe Bechtold, told Slattery that all precast concrete manholes through which electrical conduit was to be installed were the jurisdiction of Local 3, and Local 731 renewed its claim to the work in dispute. In order to

[1] All dates refer to 2003 unless otherwise indicated.

keep the work going and to meet a Transit Authority deadline, Slattery proposed an arrangement to install the next two manholes: its employees would unload each manhole from the truck, Transit Technologies employees would set it into the ground, and Slattery employees would then unhook the manhole from the crane and fill in dirt around the manhole. Local 731, however, did not agree to this arrangement. On October 1, Slattery installed two manholes using this arrangement, but told Transit Technologies representatives that from then on, Slattery employees would unload and set the manholes into the ground.

Slattery installed a manhole on October 21 using only its employees. The installation was difficult and the manhole was misaligned because of the tight fit of the manhole and the lack of room to adjust it. On October 22, Slattery informed Transit Technologies that the manhole was ready for the installation of conduit. Slattery Project Manager Mike Viggiano testified that Transit Technologies General Foreman Pat Maccalusso (a member of Local 3) told him that the Electricians would not run conduit to the manhole because the Electricians did not install it, and that Local 3 had instructed Maccalusso not to run conduit to manholes not set by the Electricians. Consistent with these statements, Transit Technologies employees did not run conduit to the manhole installed on October 21 by Slattery's employees.[2]

Since the end of October, Slattery has installed 13 manholes using a "double handling" arrangement in which Slattery employees dig the hole for the manhole, unload it from the truck, and unhook it from the crane. Transit Technologies employees then hook the manhole back up to the crane and set it in the hole. Slattery employees then fill in dirt around the manhole to complete the installation. At the time of the hearing, Slattery had approximately 15 manholes remaining for installation in the first phase of the project and expected to complete this phase by the end of the summer of 2004.

B. Work in Dispute

The work in dispute is the setting of precast concrete boxes into the ground, through which electrical conduit is to be installed, at the Corona Rail Yard Project in Queens, New York.[3]

[2] Transit Technologies finally installed the conduit in late December after adjusting the alignment of the manhole. The adjustment took Transit Technologies employees an entire day; according to Slattery, its employees could have made the adjustment in 1-1/2 hours.

[3] The record establishes that the disputed work does not involve the smaller precast concrete "handholes" routinely installed by Transit Technologies employees on the project.

C. Contentions of the Parties[4]

Local 731 contends in its posthearing brief that all the prerequisites for 10(k) jurisdiction have been satisfied: Local 3 threatened to stop work on the project unless the Transit Technologies employees it represented installed the concrete manholes; both Local 731 and Local 3 have claimed the disputed work; and there is no agreed-upon dispute resolution plan to which all the parties are bound. According to Local 731, the Board should award the work in dispute to the employees it represents. Contending that Local 3 has a proclivity to violate Section 8(b)(4)(D) of the Act and that this dispute is likely to recur on its other projects in the New York City area, Local 731 requests a broad, areawide award.

Local 3 moves to quash the notice of hearing, asserting that the dispute is principally a contractual dispute between Slattery and Transit Technologies regarding which employer is responsible for assigning the disputed work and does not present a jurisdictional dispute under Section 10(k). Local 3 also contends that its objective was work preservation. Local 3 further argues that there is no clear evidence that it threatened Slattery with a cessation of work if the work in dispute was not assigned to Local 3-represented employees, and, therefore, there is no reasonable cause to believe that it violated Section 8(b)(4)(D). Citing its submission of the dispute to the National Plan for the Resolution of Jurisdictional Disputes in the Construction Industry (National Plan), Local 3 states that "there probably is an agreed upon method to resolve this dispute which binds all parties." With regard to Local 731's request for a broad, areawide award, Local 3 contends that the request is frivolous because there have been no previous disputes regarding work similar to the work in dispute involving Local 3.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work among rival groups of employees and that a party has used proscribed means to enforce its claim to the work in dispute. See generally *Teamsters Local 174 (Airborne Express)*, 340 NLRB No. 20, slip op. at 3 (2003). Additionally, the Board will not proceed under Section 10(k) if there is an agreed-upon method for voluntary adjustment of the dispute. Id.

[4] Slattery did not file a posthearing brief.

1. Local 3's motion to quash

As discussed above, Local 3 contends that the Board should quash the notice of the 10(k) hearing because the dispute that gave rise to this proceeding is not a true jurisdictional dispute but is instead a contractual dispute between Slattery and Transit Technologies. We reject this contention. The record evidence shows that Slattery has the authority to assign the work in dispute. As discussed above, the subcontract provides that Transit Technologies was only to support Slattery's installation of manholes. Additionally, Transit Technologies's prebid exceptions exclude the disputed work from its responsibilities on the worksite. Thus, these documents definitively establish that Slattery, not Transit Technologies, is the employer ultimately responsible for the installation of manholes on the project.

Local 3 also contends that the dispute is not cognizable under Section 10(k) because its actions were aimed at work preservation. The record, however, does not support this contention. Employees represented by Local 3 have not traditionally performed the disputed work for Slattery, and Local 3 does not have a contractual claim to the work in dispute. Slattery's assignment of some of the disputed work to employees of Transit Technologies beginning in October does not establish a work preservation objective because the instant jurisdictional dispute prompted Slattery's assignment of the work. Thus, Local 3's conduct appears aimed at work acquisition and not work preservation. See *Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB 518, 521 (2001) (refusing to quash notice of hearing where union's objective was work acquisition not work preservation).

2. Competing claims to work in dispute

As discussed above, after two manholes were set in August, Local 731 Business Manager D'Amato told Slattery that the setting of precast concrete manholes belonged to the Laborers. Additionally, during the September 30 meeting, at which officials of both locals and Slattery were present, Local 3 Business Representative Bechtold informed Slattery that precast concrete manholes through which electrical conduit was to be installed were the jurisdiction of Local 3. Accordingly, we find that there are competing claims to the disputed work.

3. Use of proscribed means

There is evidence that Local 3 threatened Slattery with a work stoppage if the disputed work was not reassigned to employees it represented. As noted above, Transit Technologies General Foreman Maccalusso told Slattery Project Manager Viggiano that Local 3 had instructed him not to install electrical conduit in manholes installed by Slattery's Local 731-represented employees. Consistent with this threat, Local 3-represented employees of Transit Technologies did not install electrical conduit in a manhole installed solely by the Laborers. The fact that Local 3's business representative, Bechtold, denied that Local 3 made any such threat is inconsequential to the establishment of jurisdiction.[5] Therefore, we find that there is reasonable cause to believe that Local 3 used proscribed means to enforce its claim to the work in dispute. See *Iron Workers Local 1 (Goebel Forming, Inc.)*, supra.

4. No voluntary method for adjustment of dispute

The record does not establish that all of the parties have agreed to a voluntary method for adjustment of this dispute.[6] Local 3 submitted this dispute to the National Plan but it named Transit Technologies, not Slattery, as the employer responsible for assigning the work in dispute. Although Local 3 and Transit Technologies are bound by the National Plan by the terms of their collective-bargaining agreement, there is no evidence that Local 731 or Slattery are bound by the National Plan. For the purposes of 10(k) jurisdiction, all parties, including the employer, must be bound to the dispute resolution mechanism. *Operating Engineers Local 150 (Diamond Coring Co.)*, 331 NLRB 1349, 1350 (2000).

In sum, we find there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

The grant of authority in Section 10(k) for the Board to "hear and determine" jurisdictional disputes requires the Board to make an affirmative award of the disputed work to one of the groups of employees involved in the dispute. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 579 (1961). While the Act does not set out the standards the Board is to apply in making this determination, the Supreme Court has explained that "[e]xperience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board." Id. at 583. Consistent with the Court's opinion, the Board announced in *Machinists*

[5] Conflicting versions of events do not prevent the Board from proceeding under Sec. 10(k). The Board need not rule on the credibility of testimony in order to proceed to a determination of the dispute because the Board need only find reasonable cause to believe that Local 3 has violated the statute. See *Iron Workers Local 1 (Goebel Forming, Inc.)*, 340 NLRB No. 136, slip op. at 3 fn. 4 (2003).

[6] The parties initially stipulated that there was no voluntary dispute resolution method that bound all parties. Local 3 later withdrew from this stipulation.

Lodge 1743 (J. A. Jones Construction), 135 NLRB 1402, 1410–1411 (1962), that in making the determination that the Supreme Court found was required by Section 10(k), it would consider "all relevant factors," and that its determination in a jurisdictional dispute would be an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. See generally *Teamsters Local 174 (Airborne Express)*, 340 NLRB No. 20, slip op. at 4 (2003).

We have considered the following factors, which we find relevant in the context of the current dispute and, for the reasons set forth more fully below, we conclude that Slattery's employees represented by Local 731 are entitled to perform the work in dispute. In making this determination, we emphasize that we are awarding the work to Slattery's employees represented by Local 731, not to that Union or its members.

1. Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute. Accordingly, we find that the factor of Board certifications does not favor awarding the disputed work to employees represented by either Union. See *Iron Workers Local 1 (Goebel Forming, Inc.)*, 340 NLRB No. 136, slip op. at 4.

Slattery has a collective-bargaining agreement with Local 731, and although Local 3 has a collective-bargaining agreement with Transit Technologies, Local 3 does not have a collective-bargaining agreement with Slattery. Slattery's subcontract with Transit Technologies specifically excludes the disputed work from Transit Technologies' responsibilities as discussed above. Thus, it is Local 731's collective-bargaining agreement with Slattery that is relevant here because Slattery, not Transit Technologies, has the ultimate control and authority over the assignment of the disputed work under the subcontract. *Iron Workers Local 1 (Goebel Forming, Inc.)*, supra (finding that relevant agreement is one with employer with ultimate control over the assignment of the disputed work); *Elevator Constructors, Local 91 (Otis Elevator Co.)*, 340 NLRB No. 14, slip op. at 3 (2003) (finding that relevant agreement is one with employer with ultimate authority over the work). Moreover, Local 731's collective-bargaining agreement with Slattery specifically refers to the work in dispute.[7] Accordingly, we find that the factor of collective-bargaining agreements weighs in favor of awarding the disputed work to the employees represented by Local 731.

2. Employer preference and past practice

Slattery General Superintendent Attardo testified that Slattery preferred to use its employees, who are represented by Local 731, to perform the disputed work. Accordingly, we find that the factor of employer preference favors awarding the disputed work to the employees represented by Local 731.

Slattery Project Superintendent Mesbah testified that Slattery has traditionally used its Local 731-represented employees to install precast concrete manholes. Slattery Project Manager Viggiano testified that during the 10 years he has worked with Slattery, the Laborers have always installed precast concrete manholes. Accordingly, we find that the factor of employer past practice favors an award of the disputed work to employees represented by Local 731.[8]

3. Area and industry practice

The parties presented no evidence with respect to industry practice. With respect to area practice, there is evidence that both employee groups have actually performed the disputed work in the past in the relevant area. Transit Technologies General Superintendent Leonard Copicotto testified that he installs "precast concrete boxes" of all sizes all over the New York City area on a regular basis using employees represented by Local 3. Local 731 Business Manager D'Amato testified that during his 47 years as a member of Local 731, he has installed "thousands of precast concrete boxes" for electrical purposes and that New York General Contractors Association members are required to use the Laborers to install precast concrete manholes under the Laborers' collective-bargaining agreement. Accordingly, we find that the factor of area practice does not favor an award of the disputed work to either employee group.

4. Relative skills and training

Employees represented by Local 731 receive extensive training at the Laborers' school in order to perform the disputed work, including training in digging the hole, sheeting or bracing the hole, tamping or compacting the soil, directing the crane with special signals relied on by the crane operator, rigging the manhole to the crane, off-

[7] Art. VI, sec. C,80 of Slattery and Local 731's collective-bargaining agreement provides that the Laborers are to perform the following work for Slattery: "[e]xcavating, digging for sidewalks, including that for lighting posts, duct lines, including placing of precast concrete boxes."

[8] The fact that a composite crew of Slattery and Transit Technologies employees performed the disputed work on the project after October does not undercut this finding. Work assignments obtained by coercion (here by Local 3's October work stoppage threat) do not militate in favor of an award of that work to employees represented by that Union. See *Iron Workers Local 1 (Goebel Forming, Inc.)*, supra, slip op. at 5 fn. 12; *Longshoremen ILA Local 1294 (Cibro Petroleum Products)*, 257 NLRB 403, 407 (1981).

loading the manhole, backfilling around the manhole, and removing the rigging from the manhole. There is no evidence that the Electricians possess a similar degree of skill and training, although there is evidence that the Electricians are capable of performing the disputed work. Accordingly, we find that the factor of relative skills and training favors an award of the disputed work to employees represented by Local 731.

5. Economy and efficiency of operations

No one disputes that the current composite arrangement for installing the manholes is inefficient because of the double handling of the manhole. There is evidence that the Laborers are more efficient than the Electricians on a discrete aspect of the disputed work (correcting the alignment of a manhole), but there is no evidence demonstrating the relative efficiency of the disputed work if solely one employee group performed it. Accordingly, we find that the factor of economy and efficiency of operations does not favor an award of the disputed work to either employee group.[9]

Conclusions

After considering all the relevant factors, we conclude that employees represented by Local 731 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference, employer past practice, and relative skills and training.

In making this determination, we award the work to employees represented by Local 731, not to that labor organization or its members.

Scope of the Award

Local 731 seeks a broad, areawide award that encompasses the disputed work in the five Boroughs of New York City in which the geographic jurisdictions of Local 731 and Local 3 overlap. Local 731 contends that Local 3 has a proclivity to coerce employers into assigning work to employees it represents. Local 731 also argues that Local 3's "total job policy" indicates that disputes such as the one here will continue to be a source of controversy in the area.[10]

There are two requirements for a broad, areawide award. First, there must be evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur. Second, there must be evidence demonstrating that the charged party has a proclivity to engage in unlawful conduct to obtain similar work. See *Teamsters Local 174 (Airborne Express)*, supra, slip op. at 6; *Bricklayers (Sesco, Inc.)*, 303 NLRB 401, 403 (1991).

We find that the requirements for a broad award have not been satisfied on the record presented here. First, there is no evidence that the dispute over the installation of precast concrete boxes has been a continuous source of controversy in the area. To the contrary, Local 731 presented undisputed testimony that employees it represents have performed work similar to that in dispute here on several projects in the New York City area where employees represented by Local 3 also were present without objection by Local 3. Second, Local 731 argues that because of Local 3's "total job policy" this controversy is likely to recur at other projects where the geographic jurisdictions of the two Unions coincide. The Board, however, has previously rejected this contention. See *Electrical Workers Local 3 (U.S. Information Systems)*, supra (declining to issue broad award based on Local 3's "total job policy"), and cases cited therein.

Although Local 3 is "no stranger to Board proceedings,"[11] there is no previous 10(k) determination by the Board involving an attempt by Local 3 to force the assignment of work similar to that in dispute here. Thus, there is no evidence that Local 3 has a proclivity to use proscribed means to obtain installation of precast concrete manhole work. Compare, *Electrical Workers Local 3 (U.S. Information Systems)*, supra; *Electrical Workers Local 3 (Telecom Equipment)*, supra (declining to issue broad award under circumstances similar to this case). Accordingly, we conclude that a broad award is inappropriate and our determination is limited to the controversy that gave rise to this dispute.

[9] Local 731 argues in its posthearing brief that it is more economical for Slattery to perform the disputed work with the employees it represents rather than the Electricians because of the wage differential between the two employee groups. The Board has held, however, that wage rate comparisons are not relevant for determining whether one group of employees is more economical than another group of employees. *Laborers Local 320 (Northwest Metal Fab & Pipe)*, 318 NLRB 917, 919 fn. 6 (1995).

[10] Local 731 presented no evidence concerning a "total job policy" at the hearing, but asserts in its brief that Local 3 maintains such a policy, which provides that no member of Local 3 is to give away work coming under its jurisdiction to any other trade. See also *Electrical Workers Local 3 (U.S. Information Systems)*, 324 NLRB 604, 607 fn. 5 (1997) (discussing Local 3's "total job policy"), and cases cited therein.

[11] See *Electrical Workers Local 3 (Telecom Equipment)*, 266 NLRB 714, 717 (1983).

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Slattery Skanska, Inc. represented by Local 731, Building Concrete & Common Laborers Union are entitled to perform the setting of precast concrete boxes into the ground, through which electrical conduit is to be installed, at the Corona Rail Yard Project in Queens, New York.

2. Local 3, International Brotherhood of Electrical Workers, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Slattery Skanska, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, Electrical Workers Local 3 shall notify the Regional Director for Region 29 in writing whether it will refrain from forcing Slattery Skanska, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. June 28, 2004

Peter C. Schaumber, Member

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD